Supreme Court, U.S.
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No. 92-1546

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

UNITED STATES OF AMERICA,

Petitioner,

vs.

JOHN O. IRVINE and

FIRST TRUST NATIONAL ASSOCIATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONSE TO MOTIONS TO FILE BRIEFS *AMICUS CURIAE* BY JOHN G. ORDWAY, JR. AND MARGARET M. ORDWAY AND THE AMERICAN BANKERS ASSOCIATION

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Respondents John O. Irvine and First Trust National Association, as co-representatives of the Estate of Sally Ordway Irvine, the deceased taxpayer, submit this response to the Motions by John G. Ordway, Jr. and Margaret M. Ordway and the American Bankers Association for leave to file briefs *amicus curiae*. Respondents refused consent and oppose the motions because the putative *amici* raise nothing that has not already been brought to the attention of the Court.

Accordingly, the motions are "not favored" and should be denied. Sup. Ct. R. 37.1-.2.

John G. Ordway, Jr. and Margaret M. Ordway ("Ordway"), the brother and sister-in-law of the deceased taxpayer here, have already unsuccessfully petitioned for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit. *See Ordway v. United States*, 908 F.2d 890 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 2916 (1991). The Court also denied Ordway's request that the Court defer consideration of his petition for rehearing pending a decision of the Court of Appeals for the Eighth Circuit *en banc*. 112 S. Ct. 30 (1992). This Court, therefore, has already had the benefit of Ordway's petition.

Ordway's brief *amicus curiae* adds nothing which has not already been presented by Petitioner or Respondents. Ordway asserts without analysis a factual identity between his case and the present case and a square circuit conflict. The facts in *Ordway* are not, however, identical to the facts in this case. Indeed, they are dispositively different. Mrs. Irvine had learned of her interest in the Ordway Trust by the time she reached the age of majority, before enactment of the Gift Tax Act in 1932. Under the Treasury Regulation sought to be applied by the Government to tax Mrs. Irvine's Disclaimer of her interest, the Government's position is that Mrs. Irvine's time for making an effective disclaimer for federal gift tax purposes expired *before* enactment of the gift tax. John Ordway, much younger than his sister Mrs. Irvine, did not learn of his interest until 1941 and did not reach the age of majority until 1943. Thus, under the Regulation, Ordway's time for disclaimer did not begin to run until *well after* enactment of the gift tax. Respondents' statutory and constitutional arguments in the courts below were thus both different and more compelling than Ordway's arguments. Moreover, due to these factual differences, there is not a square conflict between the judgment in *Ordway* and that of the *en banc* Eighth

Circuit in this case, as Respondents establish in greater detail in their Brief in Opposition.

The American Bankers Association ("ABA") also brings nothing new to the Court's attention. The ABA simply repeats the Petitioner's unsubstantiated factual assertions concerning the supposed magnitude of the gift tax consequences of the Eighth Circuit's decision. Indeed, it does so to a fault, citing no other case, either past or pending, which presents the unique disclaimer situation of Mrs. Irvine's case. In the main, the ABA simply parrots the Petitioner's arguments regarding the need for certainty in matters of taxation, asserting that under the present state of the law member banks may be subject to surcharge for giving erroneous tax advice concerning disclaimers. What they do not tell the Court is that trust departments carefully avoid giving any tax advice to trust beneficiaries. *Cf. In re Otterness*, 181 Minn. 254, 257, 232 N.W. 318, 319 (1930) (bank lawyer may not give legal advice to customer). Thus, the supposed threat of surcharge actions against bank trust departments for erroneous gift tax advice is contrived.

Respondents refused consent to Ordway and the ABA, and resist the present motions, because they bring no relevant matters to the attention of the Court which have not already been brought to its attention by the parties. Accordingly, Respondents respectfully request that the motions for leave to file briefs *amicus curiae* be denied.

Dated: May 25, 1993

Respectfully submitted,

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